IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 22nd January, 1996.

CRIMINAL APPEAL NO. 134 OF 1987

For Approval and Signature:

THE HON'BLE MR. JUSTICE R.R. JAIN

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

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Shri Kirit R. Raval, Advocate for the appellant.
Shri K.P. Raval, Addl. Public Prosecutor for the respondent.

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Coram: R.R. Jain, J. & H.R. Shelat,J.
(22-1-1996)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

The appellant came to be convicted, of the offence under Section 302 of the Indian Penal Code (for short 'IPC'), and sentenced to rigorous imprisonment for life, by the then learned

Additional Sessions Judge at Surendranagar, delivering the judgment on 29th January 1987 in Sessions Case No. 44 of 1986 on his file and therefore the present appeal is before us.

2. The facts giving rise to the present appeal may in brief be stated. Shankarbhai Keshabhai and Kunvarben are the parents of the appellant Jesingbhai. The appellant married the deceased Lilaben before about 10 to 12 years. The appellant is having one son named Pravin and a daughter named Bharti. As submitted, the married life of both initially was brooming over with pleasure. Later on dissension arose between the two. The appellant was suspecting the deceased's fidelity as he came to know that she had cultivated illicit relations with some one else. Often they were quarrelling on this count. Once Lilaben had left the place and had gone to her natal house. The well-wishers and elders in the society intervened and got the matter settled. Lilaben then came back to the appellant and started to reside. Shortly before the incident the maternal aunt of the appellant informed him that Lila, his wife was not loyal to him, she was leading adulterous life, she has not ceased but maintained illicit relations with some one else at Ranpur. The appellant who had implicit faith in his maternal aunt having animosity to none, got cocksure information. He could then discern that whatever he had come to know till then was true and not merely gossip which could be brushed aside lightly. As his aunt's information was weighty he was convinced and he was considerably perturbed and shocked. He was discomposed. Lilaben had gone to her work. She returned in the evening. The appellant who had gone to attend devotional songs (Bhajan) in the evening also went back to home. After supper appellant-accused, his wife Lilaben and Bharti their daughter went to bed. Pravin was out of station. In the morning Bharti went to Kunvarben, her grandmother residing nearby. She was weeping. She sobbingly informed Kunvarben that there was some thing wrong with her mother as she was not responding. Kunvarben therefore went to the place of appellant, her son. She could see that Lilaben was no more. She found injuries on left parietal region and on the left little finger with swelling of wrist joint as well as palm. The matter was then reported to the police at Halvad, and that set the investigation by the police to motion. At the conclusion of the investigation, the police filed the chargesheet against the appellant before the Court of the Judicial Magistrate, (First Class) at Halvad. The learned Magistrate was not competent in law to hear and decide the case of murder. He therefore committed the case to the Court of Sessions at Surendranagar, which came to be registered as Sessions Case No. 44 of 1986. The then learned Sessions Judge, assigned the matter to the then learned Additional Sessions Judge for hearing and disposal in accordance with law. The learned Judge below then framed the charge at Exh.3. The appellant after knowing the accusations against him pleaded not guilty and claimed to be tried. The prosecution then examined the witnesses

and adduced necessary evidence. At the conclusion of the hearing appreciating the evidence on record and considering the rival submissions, the learned Judge reached to the conclusion that the prosecution had succeeded in bringing the guilt home to the accused-appellant and therefore he convicted and sentenced the appellant as aforesaid. It is against that judgment, the present appeal has been preferred before us.

3. Mr. Kirit Raval, the learned advocate representing the appellant took us to the entire evidence on record and submitted how the learned Judge was hasty and ill-considered in appreciating the evidence. He then urged us to allow the appeal and acquit the appellant. Mr. K.P. Raval, the learned Addl. Public Prosecutor representing the respondent submitted that no error was committed by the learned Judge below. The appreciation of the evidence made and conclusions drawn by him were quite in consonance with the materials on record and law applicable. The judgement was not at all on the verges of perverse as submitted and there was no necessity to set the evaluation right.

4. We perused the evidence on record with finicky details and meticulous care and we find that majority of the witnesses have turned hostile. To establish the case of homicidal death, the doctor who performed the post mortem has been examined at Exh.6. He has stated what injuries he noted, making it clear that all the injuries were ante-mortem and were sufficient to cause death in ordinary course of nature. When it is evident from the evidence of Doctor that Lilaben died of homicidal death, the next question that arises for consideration is who did the wrong ? It may be stated that on examining the materials on record with meticulous care and finicky details, we find that most of the witnesses have not supported i.e., they have turned hostile. Hence the case mainly rests on the circumstances. The circumstances should be fully established and they should be consistent only with hypothesis of the guilt of accused. They should be of a conclusive nature and tendency. They should be such as to exclude every other possibility, but the one proposed to be proved. The circumstances in other words should not only be consistent with the guilt of the accused but should be inconsistent with innocence. If the circumstances proved do not exclude the possibility of innocence of accused, he is entitled to benefit of doubt. The chain must be complete leaving no room to doubt and indicating no other conclusion except the guilt of the accused.

5. The incident has happened during night time at home when only three namely the appellant, his wife (deceased) and their minor daughter Bharti were present. When minor daughter was fast asleep the incident happened. After being informed by Bharti in the morning Kunvarben went there. As made clear by Kunvarben, there was no possibility of some one else entering into the house

during night time as it was chained from inside. No suggestion is made by appellant at the time of hearing that door was broken open by some one, or that the door was not chained from inside. While drawing panchnama the police also found no marks of violence on the door, or removal of ceiling roof. Kankuben and Shanker who have also stated that when they went to appellant's place, he was not at home. Why appellant left the house is not explained. Such circumstances also point to the guilt of the appellant. Bharti being minor had no cause to do wrong. She was also not able to do the wrong. The pant of appellant was seized as it was found stained with blood. The blood groups of deceased was 'AB'. The chemical analyser in his report (Exh.27 & 28) has opined that on the group of the blood found on pant was "AB". When blood of the deceased is found on the clothes of appellant, it is for him to explain how his clothes came to be blood-stained; and if he fails so to do, that circumstance will certainly operate against him pointing to his guilt. It is pertinent to note that accused has not at all explained this circumstance appearing on record and so it operates against him leaving no possibility of his innocence. In view of these circumstances, it can reasonably be said that the appellant and no one else is the offender; no other conclusion is possible. Why the appellant should cause death of his wife may be a vexatious question to some one. Kunvarben has made it clear in her evidence at Exh.8 which has been bewrayed by other witnesses namely Shankar Kesha, Kunvarben, Balu Kunvar and Tida Talshi,that after the marriage dissension for one or the another reason arose between the appellant and his wife, (the deceased) and they were often picking up the quarrels which initially began with tiffs, and later on the gap was widening with the result once Lilaben had left for her natal place and after the intervention of the well-wishers and elders she was persuaded to go back to the appellant and reside as husband and wife. The cause of dissension was so called extramarital relations of deceased with Kalo Jesing who used to write letter or loiter nearby. Some days after the settlement the incident happened because the maternal aunt of the appellant informed him on the previous evening that Lilaben had not improved but had maintained the illicit relations with some one else mentioning about delivery of a letter to Balu Kunvar. The appellant was then convinced about the infidelity of the deceased and therefore he got wild and remained distraught. During the night time,it appears, both bickered lowering down the other one, and then incident happened. It can therefore be said that the appellant and no one else caused the death of Lilaben by inflicting fatal injuries. On query, Mr. Raval, the learned Advocate representing the appellant could not show us from the materials on record that there was the scope to infer about some one else having committed the offence.

6. Having found that no one else but the appellant has caused the death of his wife it is now to be examined which of

the penal provisions would be attracted about which it has been hotly debated. Mr. Raval, the learned Advocate representing the appellant submits that when knowing about the infidelity of one's on wife the appellant lost temper and committed the wrong, Section 302, IPC would not apply, but at the most Section 304 may apply. Against such submission, the learned APP submits that Section 302 would apply as deceased had cooked his goose. Since long both were often quarrelling, and at times deceased was made to leave the house. Such past indicates the intention to kill, and for us there would be no reason to disturb the finding of the learned Judge below. To buttress his submission, he took us to the letter written by Babubhai Kesha produced at Exh. 12 which is addressed to Tarshibhai Devabhai, the father of the deceased Lilaben. In that letter assurance is given that henceforth if anything goes wrong qua the deceased,Babubhai Keshabhai would be accountable, and thereafter the incident has happened which would go to show that the appellant after being satisfied about the illicit relations of the deceased decided to do away her with and accordingly planning, caused fatal injury which shows the intention to cause death. We are not prepared to place any reliance on Exh.12 as the same appears to have been written by Jesing Chhana who is certainly not the appellant and secondly Babubhai Keshabhai undertook the responsibility for the conduct of both. But that apart the letter cannot be construed establishing the intention to kill. The factors steering the mind of the accused to do a particular act or wrong should be examined for ascertaining the intention. The factors impelling the man go on changing and do not remain in the mind always. What can be deduced perusing the letter (Ex.12) is that the elders and respectable persons settled the dispute between the two and whatever ill-will of one prevailed against another was removed and healthy relations were restored. The appellant forgot the past and preferred to have a new innings without any bitterness or animosity. In case leter on breach of assurance is committeed, intention cannot be assumed or inferred as breach can be for many other reasons. What led the appellant to do the wrong has to be inquired into, and we cannot assume against the appellant on the basis of the letter simpliciter. The contention therefore gains no ground to stand upon.

7. Having faced with such situation, the learned APP drew our attention to the FIR which was, according to him, from all relevant angles sufficient to fasten the appellant with the liability that arises under Section 302, IPC. The contention does not gain the ground to stand upon. As per the case of the prosecution the appellant went to the police station and lodged the complaint. When the appellant who is the accused has himself lodged the complaint, it is not admissible in evidence and therefore it has been rightly not admitted in the evidence by the lower Court. In the case of Bheru Singh vs. State of Rajasthan - Judgments Today (1994) 1 S.C.501, the Supreme Court has made it

clear that the FIR given by the accused himself cannot be used against him so far as the confessional part is concerned. So far as his conduct is concerned under Section 8, Evidence Act, the same can be looked into, but it is restricted to the non-confessional aspect thereof. If accordingly the FIR is treated, the confessional aspect therein has to be ignored, and if that is done there is nothing therein which would lead us to hold the appellant guilty of the offence under Section 302.

8. The applicability of a particular penal provision depends upon the intention of the wrong-doer. The intention is the internal act of the mind and invisible too of the offender.Hence it has to be judged by the external and visible acts on record. As discussed above, in this case, infidelity of Lilaben is the cause of her death. At the cost of repetition, we may say that after being convinced owing to the tempestuous information, the appellant received from his material aunt, he was eating his heart out. After going to his home he inquired about the letter the postman gave to Balu Kunver who had then transmitted to the deceased. Both then wrangled. In the heat of patience and in the spur of moment after his patience had strained to the utmost by the immoral conduct of the deceased, i.e. obstinancy, viciousness and flagrant immorality of his wife despite persuasion and assurance earlier, the appellant did the temararious act i.e., he drubbed and caused injuries to which the deceased succumbed. In our view, therefore, he committed the wrong under grave and sudden provocation. When that is the case, the case falls within the ambits of Section 304 Part I, and not Section 302, IPC. The sentence inflicted by the learned Judge below being erroneous will have therefore to be altered and for this limited extent the appeal will have to be partly allowed.

9. Let us mention at this stage that the accused has been convicted on 20th January 1987. We are told that the appellant is in Jail from 23rd March 1986, the day on which he was arrested by the police during the course of investigation. By now, the appellant has completed 9 years and 10 months in jail. In our view, whatever sentence he has undergone up-till-now is sufficient and he should not be made to undergo more imprisonment of the offence u/s. 304, Part I, I.P.C.

10. For the foregoing reasons, the appeal is partly allowed. The judgment and order of the lower Court convicting the appellant of the offence under Section 302, IPC and sentencing him to life imprisonment, is quashed and set aside. But the conviction and sentence is altered to that of under Section 304 Part I, and the appellant is sentenced thereof to the imprisonment already undergone.

11. By now, the appellant has undergone the sentence we are inflicting. He be therefore set at liberty forthwith if no

longer required in any other matter.

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